IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 206 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

GUJARAT STATE ROAD TRANSPORT CORPORATION

Versus

KAY ORR BROTHERS

Appearance:

MR PRANAV G DESAI for Petitioner

MR VIMAL PATEL for MR KS NANAVATI for Respondent Nos. 1 and 2.

CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 11/07/2000

ORAL JUDGEMENT

1. This appeal is by the original plaintiff, Gujarat State Road Transport Corporation (hereinafter referred to as 'the plaintiff'), who filed Civil Suit No. 3633 of

1975 against the respondents who were the defendants in the suit to recover Rs.24,921=57 ps. as damages on the ground of breach of contract alleged to have been committed by the defendants. It has been alleged that the defendant nos. 2 and 3 are the partners of defendant no. 1 firm. Upon recording of the evidence of the plaintiff learned Principal Judge of the City Civil Court at Ahmedabad by his impugned judgment and decree dated 6/8/1979 dismissed the plaintiff's suit. The plaintiff has, therefore, preferred this appeal against the said judgment and decree of dismissal of its suit.

2. The plaintiff proceeded before the trial Court with the case that the plaintiff invited offers for Hard Chrome Plating Tank and the 1st defendant offered to supply the same. Upon the acceptance of the offer and as per the terms and conditions of the agreement so arrived at between the parties, namely the plaintiff and the 1st defendant, delivery of the tank was required to be completed within 10 to 12 weeks after the receipt of the purchase order. The defendant intimated the plaintiff by letter dated 23/10/1972 that the said tank was expected to be ready for despatch on 30/10/1972 and called upon the plaintiff to depute the plaintiff's representative to inspect the same at their principal's works at Calcutta. Mr. Motta of the plaintiff went for inspection on 11/11/1972, but he found that the tank did not conform to the specifications. The Works Manager, Central Workshop of the plaintiff at Naroda addressed letter to the Controller of Purchases of the plaintiff pointing out that the tank offered by the defendant was defective and that the said tank could not be rectified without damaging the tank itself. He, therefore, recommended that the tank should be rejected. In the meantime, the 1st defendant wrote letter dated 24/11/1972 to the Controller of Purchases that the tank was ready for despatch with requisite modifications and called upon the plaintiff to confirm whether the tank could be despatched or not. The plaintiff thereafter wrote letter dated 16-18/12/1972 through its Works Manager that the tank was rejected. Inspite of such rejection of the tank, the plaintiff replied defendant's letter dated 24/11/1972 and expressed willingness to have inspection of the tank as modified by the defendant provided the inspection charges in the sum of Rs.500/- were arranged for enabling the plaintiff to depute its representative to Calcutta for inspection. Some correspondence took place in that respect. But the defendant no. 1 did not arrange to make payment of Rs.500/- and, therefore, the inspection could not be done. Ultimately the Works Manager of the plaintiff vide letter dated 29/3/1973 pointed out several

major defects which were beyond the scope of rectification. He, therefore, advised the Controller of Purchases to cancel the purchase order in question.

3. At the conclusion of the aforesaid correspondence the defendant firm by communication dated 14/5/1973 informed the plaintiff that the cancellation of the plaintiff's order was arbitrary and the plaintiff should arrange to refund the earnest money deposit of Rs.200/-. The plaintiff, however, decided to resort to risk purchase against defendant no. 1 as the rectified tank which was offered by the defendant was not useful even with the modifications and, therefore, the plaintiff had to take resort to the alternative source of supply, namely M/s. Ustav Electro Chemical Product, Baroda at the cost of Rs.43,119=86 and thereby incurring loss in the sum of Rs.24,921=57 ps., which amount has been claimed by the plaintiff in the suit.

4. The defendants as per written statements exhs. 21 and 24 filed by first two defendants, denied the allegations made in the plaint inter-alia stating that Mr. Motta of the plaintiff visited the plant site at Calcutta on 11/11/1972 and after his inspection he gave some directions to the manufacturers for modifications in the tank to be supplied to the plaintiff, that on 11/12/1972 the plaintiff was informed about the tank being ready for delivery seeking instructions for despatch, after carrying out the modifications, that the rejection on the part of the plaintiff was arbitrary and that said defendants had therefore to seek refund of earnest money from the plaintiff. It has finally been asserted that one of the elementary principles of the risk purchase is that there should be notice to the party concerned about taking resort to risk purchase on account of failure on the part of the said party to deliver the goods in non-compliance of or in breach of the contract between the parties. In the present case, assert the first two defendants, there was no notice at all that risk purchase would be resorted to. Hence, the plaintiff would not be entitled to claim damages from the defendants.

5. At the outset, it might be noted that the 3rd defendant has not been residing at Madras and she has not been properly served in asmuch as she has been residing at Bangalore and she would not be answerable to the alleged claim in the suit without appropriate opportunity of setting her defence.

6. Following issues were framed at exh. 26 :-

1. Whether plaintiff proves that it was justified in rejecting the suit tank by its letter dated 29/3/1973 on the ground that the tank was beyond the scope of rectification to the plaintiff's requirement ?

2. Is it proved that there was breach of contract on the part of the defendants as alleged in the plaint ?

3. Whether plaintiff is entitled to claim Rs.24,921=57 as damages on the ground of breach of contract by the defendant as alleged in the plaint ?

4. Is the plaintiff entitled to the reliefs claimed ?

5. What decree and order ?

The Ld. Principal Judge at the conclusion of the trial answered the first 4 issues in the negative and dismissed the suit as per the final order.

7. At the final hearing of this appeal Mr. P.G. Desai, Ld. Advocate for the plaintiff has submitted that the Ld. Principal Judge has erred in not accepting the ex-parte evidence adduced on behalf of the plaintiff and has erred in relying upon the correspondence only. He has submitted that the plaintiff has placed the correspondence on the record of the suit for showing to the Court how the defendants have committed breach of the contract in question. According to his submission there was no reason to discard the evidence adduced by the plaintiff when the said evidence has gone unchallenged. In reply, Mr. Vimal Patel, Ld. Advocate for Mr. K.S. Nanavati, Ld. Advocate for the defendants has supported the dismissal on number of grounds. He has firstly submitted that the plaintiff went on corresponding with the defendants inspite of the rejection of the tank in question. According to his submission the plaintiff has failed to prove that the defendants committed breach of the contract in question. In the alternative he has submitted that the plaintiff has failed to mitigate the damages and in any event the plaintiff could not claim more than the amount of difference between the first tenderer and the second tenderer, namely the defendants being the first tenderer and M/s. ARA Pvt. Ltd., the

second tenderer particularly when the plaintiff did not make any effort to mitigate any damages by inviting fresh tenders at the time of breach of contract. He has finally submitted that no decree could ever be passed against defendant no. 3 since there has been no proper service of summons to her in as much as she has been residing at Bangalore and not at Madras where she has been shown in the plaint to be residing.

8. In order to appreciate the submissions made on behalf of the rival parties reference will have to be made in the first instance to the relevant terms and conditions of the contract in question. Reference in this connection may be made to quotation exh. 30 and letter of acceptance exh. 44 respectively dated 16/2/1972 and 5/6/1972. Exh. 30 speaks about time of delivery to be within 10 to 12 weeks after receipt of order subject to unforeseen contingency. It also speaks about the inspection at the site where the tank is manufactured. The letter of acceptance exh. 44 indicates in clause 7 as under :-

> "If you fail to supply the stores in accordance with the terms and conditions of the tender or fail to replace any stores rejected by the Controller of Purchases, or any person on his behalf within such time as may be stipulated, the Controller of Purchases shall be entitled to purchase such stores in his sole discretion as he thinks fit and if such prices shall exceed the rate set out in the schedule, you shall be responsible to pay the difference between the price at which stores have been purchased by the Controller of Purchases and the prices calculated or the rates set out in the schedule."

Clause 9 of the said terms and conditions indicates that in case supplies are rejected if they are not according to the specifications and/or samples or not in accordance with the conditions of the order, the same would be returned to the concerned party only after freight is remitted and incidental charges are paid. In case no remittance is received within 30 days of the intimation about the rejection, the rejected material would be forfeited. Clause 13 would read :-

> "There will be no waiving of penalty clause and risk purchase clause. The condition in the quotation with penalty clause and risk purchase clause are not accepted, will not be considered."

It is not in dispute that Mr. Motta, the plaintiff's witness had an occasion to go for inspection of the ordered tank for finding out whether it was in accordance with the contract between the parties. It has been noted by the trial Court that after Mr. Motta went to Calcutta and inspected the tank the defendants wrote letter dated 16/11/1972, exh. 48, to the Controller of Purchases of the plaintiff stating therein that Mr. Motta suggested some modifications and that they had asked their principal to complete modifications and finally that the modifications would be completed within 3 to 4 days. In the said letter defendants sought for telegraphic confirmation from the plaintiff so that the tank could be despatched to Ahmedabad. Thereafter defendants wrote another letter dated 24/11/1972 exh. 29 stating that they did not receive confirmation from the plaintiff and that the tank had been kept ready for despatch after required modifications having been carried out as suggested by Mr. Motta. Reference has also been made to the internal communication dated 7/12/1972 between Works Manager and the Controller of Purchases of the plaintiff noting that the result of the inspection by Mr. Motta indicate that the tank which was offered for delivery was not as per the specifications and therefore, could not be rectified without damaging the tank and that the tank might be rejected by the Controller of Purchase. The Controller of Purchase accordingly rejected the tank as per letter dated 16/12/1972 exh. 51 stating that the tank which was offered for delivery was not in accordance with the specifications agreed upon between the parties.

9. Pausing for a moment here, reference will have to be made to the specifications of the tank to be supplied by the defendants to the plaintiff. Such specifications are :-

HARD CHROME PLATING TANK :

i) Mild steel rectangular tank. Size 2100 mm x 900 mm x 1050 mm height to be made from 10 SWG thick sheet lined inside 3 mm thick antimorial lead sheet with provision of loose inner lining of reinforced wired glass.

ii) Set of 3 Anodes and 2 Canthodes copp rails, 40 mm x 10 mm flat with necessary connection for carrying 1000 amps current.

iii) Mild steel outer jacket tank Size 2200

mm x 1000 mm x 1150 mm made of 10 SWG thick sheet with 6 Nos. 3 KW each ..... "

Now it has been placed in evidence of Mr. Motta as well as in the reports of inspection given by him that size of inner tank was 2100 mm x 1050 mm x 900 mm (height) as against the specification 2100 mm x 900 mm x 1050 mm (height); whereas the size of the outer tank was 2200 mm x 1150 mm x 1000 mm (height) as against the specification 2200 mm x 1000 mm x 1150 mm (height) with the opinion that the tank so manufactured contrary to the specification could not be rectified and brought to the specified size without damaging the tank. On going through the impugned judgment the evidence of Mr. Motta as well as his opinion as aforesaid appears to have escaped the attention of the trial Court. In his oral testimony exh. 27 Mr. Motta has testified that he had the occasion to inspect the tank in question and he had the occasion to submit report exh. 32. According to his say the defects which he noticed in the preparation of the tank were not capable of being remedied; although some of the defects were capable of being remedied. He referred to the aforesaid defects which were not capable to be remedied without causing damage to the tank. Now this evidence of Mr. Motta coupled with his report exh. 32 have remained unchallenged on the part of the defendants and the correspondence which has been referred to by the trial Court apparently falls short to explain the aforesaid defects which were not capable of being remedied without damage to the tank. It is in this light that the correspondence which has ensued in respect of rectification of the defects has remained either silent or uncertain. Even the rectified tank was undisputably of a size which was not in accordance with the specification, but of a size which was more than the size prescribed in the specification. Thus, the rectified tank also did not conform to the size which was specified. It is under such circumstances that the rejection letter dated 16/12/1972 exh. 51 would assume a great deal of importance and in my considered opinion neither party can escape from the said document. The date of the rejection letter would also assume a great deal of importance and the plaintiff cannot escape from the said date, namely 16/12/1972. In fact the date of breach of contract would have been earlier to 16/12/1972. However, it is only on 16/12/1972 when the plaintiff intimated the defendants about rejection of the tank which was offered for delivery as aforesaid. Thus, the plaintiff has alleged breach of the contract to have been committed as on 16/12/1972 and the correspondence which has ensued thereafter, clearly does not bring about any

novatio with regard to supply of the alleged rectified tank. In this connection it may be noted that for second inspection, even after the letter of rejection as aforesaid, the plaintiff proposed payment of Rs.500/- by way of inspection charges and the defendant never accepted that proposal. This is clear from the subsequent correspondence and the statements of facts flowing from such correspondence noted by the trial Court. It would not be necessary to deal with such correspondence at length in as much as apparently it has not transformed into any fresh agreement/contract or any revised agreement/contract which is known as 'novatio' in legal parlance. It would therefore clearly appear that the date of breach of contract committed by the defendants would be 16/12/1972 and within reasonable time therefrom the plaintiff should see to mitigation of damages to the plaintiff. It is apparent from the evidence that the plaintiff has failed to do so and went on delaying the matter. The plaintiff invited tenders and purchased new tank almost after a passage of one year and claimed damages on the basis of such purchase which is not permissible in law. It would be trite law to say that where the subject matter of the contract is procurable in the market at the time of breach of contract, the damages are to be taken at the value of the article or the subject matter at the time of the breach. In the present case, it is not in dispute, there was second lower tender available for being explored by the plaintiff. It was at the rate of Rs.20,806/- and odd as against the price of the tank in question agreed to be supplied by the defendants, in the sum of Rs.17,608/- and odd. These figures have been noticed from number of documents and after verification, the learned advocates have confirmed the same. Soon after 16/12/1972 the plaintiff ought to have explored the possibility of getting the tank from the aforesaid second supplier, namely M/s. ARA Private Limited. If that was not to be done the plaintiff ought to have invited tenders immediately after 16/12/1972 so that the plaintiff might be required to pay prevalent price at that relevant point of time. In any event the plaintiff would not be entitled to damages for a sum which would be more than Rs.3198/- being the difference between Rs.20,806/- and Rs.17,608/-. Two principles with regard to compensation for loss of damage caused by breach of contract as envisaged by section 73 of the Indian Contract Act, 1872 are well settled :-

(i) As far as possible he who has proved a breach of bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good

a situation as if the contract had been performed, but

(ii) that there is a duty on him of taking all reasonable steps to mitigate the loss consequent on the breach and debars him from claiming any part of the damage which is due to his neglect to take such steps.

(See M/s. Murlidhar Chiranjilal v/s. M/s. Harishchandra Dwarkadas 1962 1 S.C.R. 653)

It is true that the principle of mitigation of loss does not give any right to the defaulting party, but the concept has to be borne in mind by the Court while awarding damages. (M. Lachia Setty & Sons Ltd. v. Coffee Board, Bangalore, AIR 1981 S.C. 162).

Above propositions will go to justify the conclusion that the plaintiff would be entitled to the damages for not more than Rs.3198/-.

10. In above view of the matter, it would clearly appear that the trial Court has failed to consider two aspects of the matter :

(i) breach of contract having been committed by the first 2 defendants as aforesaid by not accepting the unchallenged evidence of the plaintiff, and

(ii) by not considering the material on record for awarding just and proper damages to the plaintiff from the first 2 defendants.

11. Mr. Patel, however, has submitted that when the defendants finally wrote to the plaintiff about refund of earnest money, the plaintiff impliedly gave up the plaintiff's right of claiming damages. He made reference to following observations made by the trial Court :-

" ..... When the defendants wrote several letters calling upon the plaintiff to send their representative for second inspection, the plaintiff did not act and went on saying that the tank was beyond the scope of rectification to the requirements of the plaintiff and ultimately as the plaintiff did not send their representative, the defendants wrote to them that they have sustained considerable loss on account of arbitrary cancellation of the purchase order by the plaintiff and they asked the plaintiff to refund the earnest money of Rs.200/-. This letter was replied by the plaintiff on 29/5/1973 and all the Works Manager of the plaintiff wrote

> was that the plaintiff has also sustained loss owing to non-supply of the tank by the defendants and the only thing which was written in addition was that the Works Manager was requesting the Controller of Purchase for taking action pursuant to the letter of the defendants dated 14/5/1973 and the action which was required to be taken was for refund of earnest money and by letter dated 29/5/1973 the Works Manager requested the Controller of Purchase to take necessary action for refunding the earnest money to the defendants. Therefore, the chapter was closed by those letters dated 14/5/1973 and 29/5/1973. Both the parties stated that they suffered loss and the plaintiff agreed to refund the earnest money. It is pertinent to note that by letter dated 29/5/1973, defendants were not blamed for breach of contract and defendants were not threatened with claim for damages also. The Works Manager of the plaintiff accepted the demand of the defendants for refund of earnest money and, therefore, there was no question of claiming damages thereafter. ....."

On going through the whole of the evidence, however Mr. Patel was not in a position to point out that the plaintiff ever admitted to give up claim with regard to breach of contract or the plaintiff ever accepted demand of the defendants for refund of the earnest money. Only thing that the plaintiff did was to have internal communication with regard to action being taken upon the demand of earnest money made by the defendants from the plaintiff. Even the correspondence as has been referred to in the aforesaid observations of the trial Court is absolutely silent about acceptance of demand of the defendants for refund of the earnest money and giving up of the claim of damages. In that view of the matter, the submission of Mr. Patel flowing from the aforesaid observations made by the trial Court with regard to foregoing the claim of the damages cannot be accepted.

12. Mr. P.G. Desai, learned advocate for the plaintiff Corporation, however, could not make good the plaintiff's case qua the defendant no. 3 in as much as he could not point out from the record that service of summons so far as she was concerned was legal and valid. In that view of the matter, while passing final order she cannot be saddled with any liability.

13. In the result, the difference between the

contracted amount of Rs.17,608/- and the second tender amount of Rs.20,806/- will be the reasonable, just and fair amount of damages to which the plaintiff would be entitled. The plaintiff would be entitled to the said amount with simple interest at the rate of 6% p.a. on the samd amount from the date of the suit from the first 2 defendants. Following order is, therefore, passed :-

This appeal is partly allowed. The defendants nos. 1 and 2 are directed to pay to the plaintiff Rs.3198/- with running interest (simple) at the rate of 6% p.a. from the date of the suit till realisation. There shall be no order as to cost. Plaintiff's suit against defendant no. 3 shall stand dismissed with no order as to cost. Decree in these terms to be drawn up.

* * *

PVR.